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IN THE

Supreme Court of the United States

October Term, 1948

No. 149

JAMES C. TITUS, RENATA TITUS, RENATA M. RUSSELL, TUDOR A. WALL, KATHLEEN WALL AND H. W. KELLEY,
Petitioners,

vs.

THE SPITZER-RORICK TRUST & SAVINGS BANK, MARVIN H. RORICK, AND CELIAN H. RORICK, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HORTON C. RORICK, DECEASED; JAMES R. EASTON, JOSEPH R. GRUNDY, AND THE SPITZER-RORICK TRUST & SAVINGS BANK,
Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SIXTH CIRCUIT.

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I.

OPINIONS OF COURTS BELOW

The official report of the opinion of the United States Circuit Court of Appeals (Sixth Circuit) rendered in this case, is found in 167 Fed. 2d 571.

The District Court approved and confirmed the report of the Special Master appointed by it (Rec. Vol. I, pg. 124) and approved and adopted the findings of fact and conclu-

sions of law of the Special Master as the findings of fact and conclusions of law of the Court. (Rec. Vol. I, pg. 277.) Said findings of fact and conclusions of law are set forth in Volume I of the Record, pages 153 to 248, inclusive. No written opinion was rendered by the District Court.

II.

GROUNDS OF JURISDICTION

Petitioners' brief is totally incorrect in its statement of alleged jurisdictional grounds based on the rules of this court.

No federal questions have been raised or decided in this case, and no questions of any kind have been decided in conflict or probable conflict with applicable decisions of this court.

There has been no departure from the accepted and usual course of judicial proceedings, made or sanctioned by either the District or Appellate Courts.

Nowhere, even in Petitioners' brief, can be found the statement of any federal question involved, or reference to any procedures not had or conducted in the accepted and usual manner or course.

In fact Petitioners' contentions are so completely without merit, and the case is so entirely devoid of any important or unusual questions that most of this brief will consist of the detailed statement of facts and argument at the end thereof which may be used for reference only if so desired.

III.

SUMMARY STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Petitioners were the owners of certain certificates of deposit, issued by the Florida Everglades Drainage District Bondholders' Protective Committee, which certificates evidenced the ownership by the holders thereof of certain bonds of said Everglades Drainage District which had been deposited by the then owners thereof, with the said Protective Committee.

Said Protective Committee had been formed about January 2, 1931, when the first default in said bonds had occurred, and was organized for the purpose of representing the bondholders in the collection of said bonds or negotiating with the Drainage District relative to a refunding or adjustment thereof. The bonds were so deposited pursuant to the provisions of a Deposit Agreement dated January 2, 1931, executed by the Committee. At the time of the matters complained of by Petitioners, said Protective Committee consisted of Horton C. Rorick, James R. Easton and Joseph R. Grundy. (Note: The Respondent Grundy was never served with any summons in the case, and never appeared herein.) The Respondent, The Spitzer-Rorick Trust & Savings Bank was the Depositary for the Committee.

After some ten and one-half years of complex and extended litigation by the Committee (consisting of some forty-five cases) in an attempt to collect the bonds, and after extended negotiations to refund or adjust them, the Committee finally negotiated a sale of the bonds to a syndicate which had been brought into the situation by the Drainage District. The sale was at a price of $586.66 per bond, subject to the ratification of the certificate holders.

The owners and holders of over 97% in value of the certificates of deposit ratified the sale. The Petitioners were among the few who did not ratify the sale and demanded the return of the bonds represented by their respective certificates. Thereupon the Committee procured the identical bonds and coupons represented by Petitioners' certificates and offered to return them upon Petitioners paying $35.00 per bond as their pro rata share of the Committee's fees and expenses, and the signing of a receipt and release of Committee therefor. Petitioners paid the $35.00 per bond but refused to sign the release. Thereupon the Respondents invited the Petitioners to bring a suit wherein the rights of all parties could be determined, and the Respondents as Trustees would be protected. This suit was the result. The petitioners (as plaintiffs below) by their complaint filed in the District Court, prayed for (a) the return of their bonds, (b) an accounting by the defendants, and (c) damages for the alleged wrongful withholding of the bonds when re-delivery thereof was first requested. The defendants by their answer and counterclaim contended that (a) they were entitled to a release of liability as a condition precedent to the re-delivery of the bonds and asked the court for advice and instructions to it as Trustee relating thereto, (b) that plaintiffs were premature in asking for an accounting before the time when the Deposit Agreement provided for the preparation of an account for the benefit of all depositing bondholders, and (c) denied that plaintiffs had suffered any damage from the withholding, whether or not it was wrongful, and asked for additional fees for the Protective Committee's services to be fixed by the court.

The District Court, upon consideration of the pleadings, ordered the delivery of the bonds to the plaintiffs, and decreed an accounting upon plaintiffs' claims for damages and defendants' claims for additional compensation.

The bonds were then delivered to plaintiffs by the Committee and a complete and accurate accounting was had before an experienced Master appointed by the court, who found against the plaintiffs on their claims for damages, and against the Committee on its claims for additional compensation. This finding was confirmed and adopted as its own by the District Court after a hearing and extended argument thereon and a decree entered in conformance thereto. Thereupon Petitioners perfected an appeal to the United States Circuit Court of Appeals which resulted in an affirmance of the District Court.

(A detailed statement of the facts, with complete references to the Record is hereinafter contained.)

IV.

AS TO SPECIFICATIONS OF ALLEGED ERRORS

A reading of Petitioners' specifications of alleged errors discloses that no federal question, and no legal question of any importance whatsoever is involved and that Petitioners are merely seeking to have this court review the weight of the evidence. Certainly an experienced Master and two courts have not all erred in the application of simple rules of evidence.

V.

SUMMARY OF ARGUMENT

A more extended and annotated argument on behalf of Respondents is hereinafter contained if the court should find that it wants verification or amplification of this summary.

The issues in this case were very simple. The District Court based its order for the return of Petitioners' bonds upon its interpretation of the wording of the Deposit

Agreement, pursuant to which the bonds had been deposited with the Protective Committee. The court's interpretation of said agreement was at variance with the interpretation that had been placed thereon by the Committee. No appeal was taken by the Committee from the court's order, and the bonds were delivered in accordance therewith. Likewise no appeal was taken by the defendants below from the District Court's decree denying additional compensation to the Committee.

In the accounting procedure before the Master, which took several weeks, the Committee assumed and discharged the burden of accounting for, and justifying, the payment and disbursement of all funds that had come into its hands. Only simple and ordinary rules of evidence were involved in the accounting, and they were properly applied as found by both the District and Appellate Courts.

Since the District Court had decreed a re-delivery of plaintiffs' bonds to them (which was complied with), the only remaining questions referred to the Master were an accounting, which would include the propriety of the fees which the Committee had withheld for its services; whether the Committee had been justified in withholding delivery of Petitioners' bonds to them until so ordered by the court, and if so, whether Petitioners suffered any damage therefrom; and whether the Committee was entitled to additional compensation. The Master and both courts below approved the accounting made before the Master by the Committee; found that the fees of the Committee were justified, and that there had been no wrongful withholding of the bonds. The District Court also approved the Master's finding that the Committee was not entitled to additional compensation. The undisputed evidence showed that Petitioners had suffered no damage from the withholding, even if it had been wrongful. No special damages were claimed by Petitioners. As a matter of fact, Peti-

tioners obtained $75,000 more for their bonds than was received by other bondholders. They accomplished this by a series of obstructive tactics taken by them in a municipal bankruptcy proceeding later instituted by the Drainage District, and persisted in them until they finally were paid this ransom money to rescue the proceedings from prolonged litigation and to bring an early conclusion thereto.

Reference might appropriately be made here to repeated statements in Petitioners' brief using the term "conversion." Of course, there was no conversion involved in this case, and no issue of conversion was made by the pleadings. The identical bonds which had been deposited with the Committee by plaintiffs' predecessors in ownership thereof, were returned to the plaintiffs at their insistence. It is too elementary to mention that if there had been, or if plaintiffs had claimed, a conversion, the suit would have been, not to recover the bonds, but to recover the value thereof.

Thus, all issues in the instant case were disposed of in the usual and ordinary manner, by the application of simple rules of law. This court will find nothing of interest to it in the case.

We will now proceed to set forth in detail, with appropriate references to the record, the facts and argument which have been summarized above.

VI.

DETAILED STATEMENT OF FACTS

The so-called "Statement of the Case" contained in Petitioners' brief (pgs 11-69, inc.) is so partisan, biased, inaccurate, and contains so many false characterizations, all of which are contrary to the record, that it virtually loses all value as a factual statement. Throughout such

statement (and throughout their brief) Petitioners continually use such characterizations as "fraud," "misuse of funds," "conversion," "derelictions," "fictitious," etc., whereas there is not a single iota of evidence supporting the use of any one of such terms.

A correct statement of the facts, as shown by the record, completely disposes of Petitioners' contentions herein, as no real question is raised as to the application of law to the facts. Such statement of the principal salient facts, taken in the main, from the Master's Report, follows. (Note: The Petitioners herein were the plaintiffs below, and the Respondents were the defendants. Hence the terms "Petitioners" and "Plaintiffs" are used interchangeably herein, and likewise the terms "Respondents" and "Defendants." The defendant Joseph R. Grundy was never served with summons herein, and never entered his appearance, and hence was not one of the "answering defendants." Furthermore, when reference is hereinafter made to the return of bonds of plaintiffs, it includes the return of unpaid coupons, and the assignment of a pro rata part of an unpaid judgment based on a few other coupons.) The volume and page references at the beginning of each paragraph refer to the Master's Report on the subject, and the other volume and page references are to other parts of the record wherein the Master's statement is sustained or amplified.

(1) (I-179) The Everglades Drainage District of Florida over a period of years issued large amounts of bonds, with the proceeds of which it had drained, reclaimed and developed immense areas of swamp lands in the District. On January 1, 1931, the District defaulted in the payment of those of its said bonds and interest coupons which fell due on that date.

(2) (I-162) The municipal bond firm of Spitzer, Rorick & Co., of Toledo, Ohio (a partnership of which the

defendants, Horton C. Rorick and James R. Easton, and others not parties herein, were members) had purchased from the said Everglades Drainage District, for resale, a total of $11,250,000 of its said bonds, which included the $219,000 of bonds of which the plaintiffs herein claimed ownership at the time this suit was instituted, and which included all bonds of the District outstanding on January 1, 1931. (II-78, 79, *et seq.*)

(3) (I-163) The total outstanding bonds of the Everglades District, on January 1, 1931, was some $9,919,000. (III-82.) The bonds claimed to be owned by all the plaintiffs were therefore only about 2% of the total outstanding bonds of the District.

(4) (I-179) On or about November 4, 1930, W. I. Evans, attorney, and F. C. Elliott, secretary and engineer of the District, came to Toledo as a committee of the Everglades Board, to notify Spitzer, Rorick & Co. that the District was going to default in its payments of principal and interest on January 1, 1931, and asked this firm, which had been the original purchaser and distributor of the bonds, to call a general meeting of bond owners and bond houses who handled Everglades bonds, to meet in New York City on November 25, 1930, with the representatives of the District, for the purpose of forming a Bondholders' Protective Committee, with which the District could negotiate in working out the problems between the bondholders and the District. (II-82) and (III-395.)

(5) (I-179) Pursuant to the request of the Everglades District representatives above referred to, a meeting of bondholders was called and held in New York on November 25, 1930. Present at that meeting were Mr. Evans and Mr. Elliott, representing the Everglades Board, Mr. Horton C. Rorick, representing Spitzer-Rorick & Co., Mr. Walter H. Lippincott, the leading partner of Bioren & Company, a bond house in Philadelphia, which had pur-

chased through Spitzer, Rorick & Co. a large number of the bonds, Mr. Watling of Watling, Lerchen & Hayes of Detroit, and representatives of other bond houses, banks, and individual bondholders. Also present or represented were several banks in Detroit, and others, including Attorney Seymour of the Southern Sugar Company, which was then being reorganized as The United States Sugar Company, which company was not only a bondholder, but also owner of approximately 100,000 acres of land in the Everglades Drainage District. In all, over one-third of the outstanding bonds of the District were represented at the meeting. As a result of that meeting, and other meetings and conferences between leading bond owners and bond houses from that date to the end of December, a Bondholders' Protective Committee was formed, consisting of Horton C. Rorick, Walter H. Lippincott, and James R. Easton. Mr. Lippincott lated died in March, 1936, and Joseph R. Grundy was duly appointed in his place, pursuant to the provisions for filling vacancies on the Committee contained in the "Deposit Agreement" hereinafter referred to. (II-82, 83, 84.)

(6) (I-157) The Bondholders' Protective Committee elected Mr. H. C. Rorick as Chairman, and employed William Roberts of New York as its General Counsel. Marvin H. Rorick was employed as Secretary-Treasurer of the Committee, and The Spitzer-Rorick Trust & Savings Bank of Toledo was constituted as its Depositary. (II-83, 84.)

(7) (I-80) The Bondholders' Protective Committee then caused a "Deposit Agreement" dated January 2, 1931, to be prepared, which the members of the Committee executed, and to which agreement holders of Everglades Drainage District bonds could become parties by depositing their bonds with the Depositary under the terms thereof. Said agreement, and subsequent amendments thereto, are attached as Exhibit A to the answer and cross

(counter) claim of the defendants. (I-76 to 107.) A brief resume of the principal provisions of the agreement is as follows:

(a) Owners of the bonds (or interest coupons therefrom) could become parties to the agreement by depositing their bonds (or coupons) with the Depositary, and they thereby constituted the Committee as their only and exclusive attorneys, agents and trustees, with all the rights, privileges, and powers necessary to carry out the terms of the agreement. (I-77, 78 and 80.) The deposit of bonds (or coupons) and the acceptance of a Certificate of Deposit therefor, had the same force and effect as though the Depositor had in fact subscribed his name to the agreement. (I-79.)

(b) The Depositary issued its Certificates of Deposit to depositing bondholders for the bonds (or coupons) so deposited with it. (I-78.) These Certificates could be, and were, bought, sold, and dealt in on the market, as they were transferable on the books of the Committee, and new Certificates issued to the transferee. (I-79.)

(c) The Committee was vested "as trustee of an express trust, with the legal title to all the bonds and coupons deposited hereunder, and with all the rights and powers of the owners thereof" (I-80), and was given general powers to collect the bonds and interest coupons, by suit or otherwise, or to sell them, or to accept refunding bonds in lieu thereof, and to take various means and proceedings, by litigation or otherwise, in the bondholder's interest. If, however, the Committee should sell the bonds and coupons at less than the face value thereof, or accept refunding bonds having a less face value or lower rate of interest than the original bonds, then it was under duty to notify the holders of the Certificates of Deposit of such action, and thereupon the holders of the Certificates of Deposit, had the right, within thirty days thereafter, to

withdraw from the Committee the bonds (and coupons) represented by such Certificates. (I-80 to 86.) Amendments to the Agreement could be made by the Committee, upon notice to the depositing bondholders, who could then withdraw from the Agreement within thirty days if they did not wish to be bound by the amendment. (I-90.) However, if a Depositor so withdrew, under any of the above provisions, then he was required to pay to the Committee such amount as the Committee should determine to be his "pro rata share of the expenses of the Committee to the date of such withdrawal, and at the election of the Committee, such amount as the Committee in its discretion may fix as his pro rata share of the liabilities of the Committee." (I-86.)

(d) The Committee was empowered to employ, and pay, attorneys, agents, and other employees (I-91), and was itself entitled to compensation for its services. (I-94.)

(e) Collections made by the Committee upon the bonds and coupons were to be distributed to the Depositors at such time or times as the Committee should determine after deduction of expenses and liabilities. (I-83, 84.)

(f) Final accounting by the Committee was provided for as follows: "Upon the accomplishment of the purposes of this agreement, or other termination thereof, the Committee shall file with the Depositary an account of its receipts and disbursements, and notice of such filing shall be given to the Depositors," etc. (I-96.)

(g) The Committee was "authorized and empowered to construe this agreement, and its construction made in good faith shall be final and conclusive upon all of the parties hereto." (I-90.)

(8) (I-184) There was deposited with the Committee's Depositary, under the terms of the Deposit Agreement, a total of $8,630,000 of the aforesaid bonds of the Everglades District. (I-100 and VI-554.) The bonds so

deposited therefore constituted approximately 95% of all of the bonds of the District then outstanding.

(9) (I-180 and 181) On page 181 of the record, the Special Master in his report says, "The Committee proceeded promptly and vigorously with attempts to collect the bonds and interest." One of the early steps taken by the Committee was to arrange for a meeting with the Board of the Everglades District, the trustees of the Florida Internal Improvement Fund, and representatives of land owners in the District, at Jacksonville, in order to work out some program whereby the District would be given some relief from its immediate obligations under the bonds, and be allowed additional time, and lower current requirements to meet such obligations. Such a meeting was held in Jacksonville on February 2, 1931, and there, for the first time, the Bondholders' Protective Committee found out that the District and its landowners had no intention of ever paying the bonds in full, and their statements forecast the course upon which they then embarked of opposition and attempted repudiation by every means at their disposal. Thereafter, for nearly ten and a half years, a continuous conflict was carried on between the District and the Committee, the former trying to avoid payment of the bonds, and the latter trying to collect them. It is virtually impossible to give definite citations to the record in support of the statement, as a large part of the testimony of H. C. Rorick and James R. Easton, covering many pages, is directed to this point. A reading of the twenty-two reports rendered by the Committee to the depositing bondholders, being Defendants' Exhibits Nos. 1 to 22, inclusive, will give a running account of this long conflict. The Court of Appeals of Lucas County, Ohio, in the case of *Bechtel vs. Rorick et al.*, reported in 65 Ohio App. 455 (referred to by the Special Master in his report in I-201), said on page 463 of its opinion rendered on June 5, 1939:

"Since 1931 when the full force of the present depression came upon the great development enterprises of Florida, of which the drainage of the Everglades was one of the largest, the officers of that district and the State of Florida, acting through its Legislature and various administrative officers, have sought by legislation, inaction and every possible aggressive interference to invalidate and even repudiate the bonds of the district. By various proceedings in federal courts, the committee has so far successfully opposed these efforts and has established the bonds as valid obligations of the district."

Mr. James R. Easton, a member of the Bondholders' Committee, testifying as shown in the record, Vol. IV, page 704, summarized the situation as follows:

"We had all sorts of opposition from the State Officials, Legislature, Commissioners of the Everglades Drainage District and the landowners. We were fighting them uphill and downhill all of the time, and we certainly were having all kinds of trouble."

Mr. H. C. Rorick, Chairman of the Committee, testifying as shown in the record, Vol. IV, pages 103 and 104, said in part:

(103) "With this example of the State, as the largest landowner, refusing to pay any Everglades Drainage District taxes, the direct result was that most every landowner in the District also refused to pay Drainage District taxes * * *.

(104) "The committee had to face this situation real early. In opposition to the committee there was used every possible obstruction. They refused to pay taxes. They refused to assign to the committee any tax certificates so that the committee could bring suit to enforce. So the committee had to face and fight the State of Florida, its Trustees of the Internal Improvement Fund, and its Legislature; because the Florida Legislators repeatedly during the

life of the committee passed acts which they knew, and the Everglades Board knew, were unconstitutional and directly contrary to the rights of the bondholders."

(10) .(I-184) One very large element in the activities of the Committee consisted of its attention to some forty-five law suits, to which it was either a party, or in which issues were involved bearing upon the bonds which it was trying to collect. A list of these cases and a summary of each of them is contained in Defendants' Exhibit No. 104 (VI-842 to 862). Mr. H. C. Rorick testified at length about the suits at so many places in the record that it would be an unwarranted task to try to designate them all, but he was cross examined at length on many of them as shown in Vol. III, pages 397, *et seq.* The Special Master in his report (I-184 to 212) gives a very excellent summary of these cases, under the heading, "Litigation involving the Committee and relating to the bonds." As a prelude to this part of his report, the Special Master says:

> "The nature of the activities of the Committee is shown in their twenty-two reports to depositors, Defendants' Exhibits 1 to 22, inclusive, and Defendants' Exhibit 104, entitled 'Memorandum as to 45 Suits Which Required the Attention of the Florida Everglades Bondholders' Committee Under the Deposit Agreement Dated January 2, 1931, Down to July 1, 1941.'
>
> "The litigation involving the bonds was, so far as appears, the most involved, difficult and prolonged of any litigation of a similar nature referred to in evidence or cited by counsel, and engaged the activities of the committee and its counsel almost continuously for a period of ten years. A detailed account of the services of counsel appears in the deposition of William Roberts and in his statement of service (Defendants' Exhibit 44) and that of Watson, Pasco & Brown (Defendants' Exhibits 46 and 46a). Most of the state cases seem to have

reached the Supreme Court of Florida and some of the federal cases reached the Supreme Court of the United States. These cases of themselves constitute unimpeachable evidence of the difficulties confronting the committee, the extent of services necessary to establish the validity of the bonds and to collect thereon, and the many obstacles thrown in the path of the committee by adverse interests."

(I-180) Many of the suits had to do with setting aside unconstitutional Acts which the Florida Legislature kept passing in an attempt to prevent the collection of the bonds, such as the Acts of 1931, 1937, and 1939. Other suits had to do with attempts to compel the District and State officials to levy and collect taxes, and to compel tax payments by landowners. On this subject the Special Master in his Report (I-181) says in part:

"The nature of the problems and the extent of the litigation which the Bondholders' Protective Committee were forced to bring and vigorously prosecute in order to have the 1929, 1931, 1937, and 1939 amendments declared invalid, were unlike and apparently much more difficult than any litigation brought by other Florida bondholders' committees or refunding agents referred to in evidence, because of the peculiar relation of the State of Florida to the bond and tax laws of the Everglades District and the strenuous and bitter efforts made by the head officials of the State of Florida, aided by the Florida legislature and the large landowners in the Everglades District, to do everything within their power to cut the ground out from under the holders of Everglades bonds and make their bonds as near worthless as was within their combined power.

"The Committee * * * brought suits to establish the validity of the bonds, secure judgments thereon, and compel the levy and collection of taxes to pay the same. The State of Florida, its officers and legislature, the Everglades Drainage District and its officers, and the large owners of land in the District,

with all of their power, influence and efforts, opposed the actions of the Committee. The evidence indicated that even some of the local courts appeared to be hostile and that some collusive actions were brought to establish precedents with which to confront the Committee."

(I-185) Two suits in which judgments were obtained and collections made should probably be referred to here as they have importance in connection with later developments commented on hereinafter. These are succinctly summarized by the Special Master in his Report as follows:

"Suit filed in the United States District Court at Pensacola to obtain judgment on $51,000 of bonds and $116,872.50 of coupons which became due on January 1, 1931. On May 10, 1932, judgment was entered in this case for the committee for $184,349.00 with eight per cent interest thereon, on which the committee collected $224,127.62. The amount realized for depositors in making the above collections, together with $50,759.43 collected on the second judgment obtained November 16, 1936, amounted to $274,887.05, and this in no way depreciated the market value of the bonds and coupons deposited. That is, the committee collected from the purchasing syndicate and the syndicate in turn collected from the Everglades District under its plan of composition of June 13, 1941, approved and confirmed by the decree of March 6, 1944, in the United States District Court, exactly the same price for plaintiffs' bonds and all other bonds deposited with the committee as was collected from the District by bondholders who never deposited their bonds or coupons with the committee and surrendered their bonds with the January 1, 1931, and all subsequent coupons attached."

Mr. H. C. Rorick testified on this subject in many places in his testimony, including that shown at Vol. III, page 266.

(11) Prior to the withdrawal by plaintiffs of their bonds from deposit with the Committee, as hereinafter referred to, the Committee, out of funds collected by it, paid to all depositing bondholders the sum of $20.00 per $1,000 bond. (Defendants' Exhibit 24. Vol. VI, page 595, *et seq.*)

(12) (I-223) In addition to their attention to the many law suits hereinbefore mentioned, the Committee had numerous meetings from time to time with officers and representatives of the Drainage District, officials of the State of Florida, and landowners in the District, in an effort to reach some settlement by way of a refunding issue of bonds, payment of the bonds over an extended period of time, compromise settlement by sale of the bonds below par, or other means. A resume of some of the meetings is contained in the Special Master's Report (I-223, *et seq.*) under the caption "Meetings between the Committee and the Everglades Board and landowners leading up to the settlement." Mr. H. C. Rorick testified at some length on these meetings, and his testimony thereon is found throughout the record. (II-235, III-239, III-242, III-249, and elsewhere.) A final meeting was held at Thomasville, Georgia, on March 6, 1941, at the request of Governor Spessard L. Holland of Florida. In attendance at the meeting were Governor Holland, the Attorney General and the State Treasurer of Florida, Trustees of the Internal Improvement Fund, H. C. Rorick and James R. Easton of the Depositors' Committee with their attorneys, William Roberts of New York, W. H. Watson of Pensacola, and Manley P. Caldwell. Also in attendance were members of the Board of Commissioners of the Everglades Drainage District with their attorneys, and representatives of large landowners. (V-972.) Mr. Rorick was urged to make a proposition of settlement, and in response thereto agreed to recommend to the bondholders a proposition

which he had made at a former meeting, to accept $500 per $1,000 bond with 4% interest from January 1, 1938, or to accept refunding bonds. No agreement was reached at that meeting, but at the behest of two members of the Florida Supreme Court a meeting was held the next day at Tallahassee, at which a proposed agreement was drafted whereby the Committee agreed to recommend to the bondholders an acceptance of refunding bonds to be dated January 1, 1938, payable 30 years from date, bearing certain accellerated rates of interest, and callable at 50% of their par value, plus accrued interest, on or before January 1, 1943. (VI-526, III-249, 250.) On April 7, 1941, the Everglades Board and landowners met at Tallahassee with the Governor and rejected the proposal above referred to, which the Bondholders' Protective Committee had agreed to recommend, and appointed Governor Holland as their representative with power to handle further negotiations for a settlement. (I-226, III-250.)

(13) (I-226) On April 23, 1941, one Lew Hall, as a representative of Governor Holland, came to Toledo to see H. C. Rorick, and requested the submission by the Committee of an offer to sell the bonds deposited with the Committee at $500 per $1,000 bond, with 4% interest from January 1, 1938, in cash, without any provision for refunding bonds. The District refused to sponsor the legislation that would be necessary for the Committee to get refunding bonds. Thereupon, Mr. Rorick agreed to recommend to the depositing bondholders that the Committee be authorized to sell the bonds on the above terms. Pursuant to such agreement, the Committee wrote a letter on April 24, 1941, recommending such a sale. (III-250, 251, 252.) The Committee received consents from the owners of a large amount of the deposited bonds. Some time thereafter a representative of The Ranson-Davidson Co., a bond house, came to Toledo and represented to Mr. Rorick that it and

some associates had formed a syndicate, at Governor Holland's request, to purchase the bonds from the Committee on the terms the Committee had theretofore agreed to.

The syndicate was composed of Ranson-Davidson & Company; B. J. Van Ingen & Co., Inc., New York; John Nuveen & Co. of Chicago; and Fenner & Beane of New York. (III-253.) There was exhibited to Mr. Rorick on May 29, 1941, a letter of May 24, 1941, from the Everglades Drainage District to The Ranson-Davidson Company, setting forth the desire of the District that The Ranson-Davidson Company acquire at least 66 2/3% of the District's bonds, and then, as the owners thereof to consent to a Plan of Composition of the District's indebtedness which would be presented in a bankruptcy proceeding. (Plaintiffs' Exhibit 2.) (VII-904) (III-484.) The Committee thereupon, having been so assured that The Ranson-Davidson Company and its associates were acting in cooperation with the District, accepted an offer of The Ranson-Davidson Company et al., to buy the bonds of the Committee for $500 each with 4% interest from January 1, 1938, to June 6, 1941. (Plaintiffs' Exhibit 2.) (VII-870, *et seq.*) Inasmuch as the Committee had not received a consent to such sale by all the depositing bondholders, it was agreed with the purchasers that the Committee could repurchase any of the bonds whose owners did not confirm the sale. (VI-539.)

(14) On June 7, 1941, the Committee sent a communication (Defendants' Exhibit 20. VI-537, *et seq.*) to all depositing bondholders reporting the sale it had made of the bonds and enclosing an amendment of the Deposit Agreement authorizing the Committee to make such sale. The communication called the depositing bondholders' attention to their right to withdraw from the Deposit Agreement by notice to that effect mailed within thirty days thereafter.

(15) (I-219) By letter dated June 30, 1941 (VII-1313, *et seq.*) the plaintiff H. W. Kelley wrote the Bondholders' Committee to the effect that he was not willing to agree to the amendment authorizing the sale of the bonds as outlined in the Committee's letter of June 7, 1941, and that he was thereby withdrawing from the Deposit Agreement. Mr. Kelley said he was forwarding to the Depositary Certificates of Deposit representing the deposit of $172,000 par value of bonds of which Certificates representing $25,000 were then registered in his name, and the remaining $147,000 of which had been assigned to him and for which he wanted new certificates issued to him which he would then endorse and send to the Depositary.

On June 19, 1941, letters were sent to the Bondholders' Protective Committee by the plaintiffs J. C. Titus, Renata Titus, Renata M. Titus, Kathleen Wall and Tudor Wall. (VII-1360, 1361, 1362.) The letters are identical and express a desire to withdraw from the Deposit Agreement and ask for instructions as to the mechanics of accomplishing the withdrawal. (No further specific reference need be made herein to these plaintiffs, as the facts regarding the dealings with them raise no question not involved in the dealings with H. W. Kelley.)

On July 2, 1941, the Committee responded (VII-1317) to H. W. Kelley's letter of June 30, 1941, and said that the Committee recognized Kelley's right to withdraw from the Deposit Agreement by complying with the provisions thereof. One of such provisions was the payment of the withdrawing depositor's pro rata share of the Committee's expenses and liabilities to the date of withdrawal. The Committee fixed such amount at $35.00 per bond.

On July 3, 1941, H. W. Kelley replied by letter to the Committee (VII-1320) saying that he was sending to the Depositary his check for $6,020 in payment of the $35.00 per bond on the $172,000 of bonds which he claimed to own.

In his letter Kelley further said, "I wish to state that this payment is being made in accordance with your demand, but I reserve the right to insist upon full accounting as to the justification of this charge."

On July 7, 1941, the Committee, having in the meantime checked Kelley's claim of ownership of $172,000 of bonds, replied to him by letter (VII-1325) stating that since the Certificates representing $147,000 of said bonds were not registered in his name when the notice of amendment of agreement was given the depositing bondholders, only the registered owners thereof at that date were qualified to withdraw the bonds represented thereby from the Deposit Agreement. The letter further said the question would, however, be referred to the Committee's counsel.

On July 10, 1941, the Committee wrote Kelley again (VII-1327) stating that if Kelley insisted on withdrawal, it would be simpler and quicker for the Committee to return some bonds it had available of the same issue and amount as those represented by Kelley's Certificates.

On July 14, 1941, Kelley responded by letter to the Committee (VII-1331) advising that he had referred the matter to his lawyer.

On July 15, 1941, the Committee replied to Kelley by letter (VII-1332) saying that the Committee would deliver to Kelley $172,000 par value of bonds of the same issue as those represented by the Certificates Kelley claimed to own. This, the Committee said, would avoid putting the matter into the hands of Kelley's and the Committee's respective attorneys.

On August 5, 1941, Kelley not having accepted the Committee's above proposal, the Committee wrote Kelley (VII-1334) that it was proceeding to secure a return of the identical bonds represented by the Certificates which Kelley claimed to own.

On August 5, 1941, one Miller Walton, an attorney representing Kelley, wrote the Committee (VII-1335) demanding the return of the identical bonds represented by Kelley's Certificates.

On August 27, 1941, the Depositary sent Kelley certificates registered in his name for the $147,000 of bonds, the certificates for which had been sent to the Depositary by Kelley for transfer to him. The Depositary said the charge for the transfer was $4.75. (VII-1338).

On August 29, 1941, the Committee wrote Kelley (VII-1340) that further steps were being taken to secure for return to Kelley the $172,000 of bonds about which they had corresponded. For reasons set forth in the letter, the Committee further said therein, "We therefore feel it is our duty, as such Trustee, to require from you, as a withdrawing depositor, a written release of all claim under the Deposit Agreement upon delivering to you the identical $172,000.00 bonds and coupons * * *." The letter further said, "For the purpose of securing an amicable settlement and release, we are willing to meet your view and that of your counsel, that you are entitled to withdraw the $147,000 bonds and coupons, and substitutes therefor, which were not registered in your name on June 6, 1941. * * * If we are unable to secure an amicable adjustment and release at the present time, then we think it best to have your rights and those of the Committee, judicially determined by a court in a suit by you against our Committee, before delivery to you of the bonds and coupons and assignment of interest in judgment of November 16, 1936, but hope such suit will not be necessary."

On September 8, 1941, the Committee wrote Kelley (VII-1343) a supplement to its previous letter to him, and thereby advised him that it had ready for delivery to Kelley the identical $172,000 of bonds represented by his Certificates, with assignment of portion of judgment of May 10,

1932, upon compliance by Kelley with the Committee's previous requirements contained in its letter of August 29, 1941.

On September 10, 1941, Miller Walton, as attorney for all of the plaintiffs, wrote the Committee (VII-1345) asking for certain information relative to the assignment of part of judgment of November 16, 1936.

The Everglades Drainage District, on or about June 13, 1941, filed in the United States District Court for the Southern District of Florida, Miami Division, a petition in bankruptcy (VII-1291) seeking confirmation of a Plan of Composition (Plaintiffs' Exhibit 6, VII-1135 *et seq.*). The plaintiffs in the instant case opposed the Court's approval of the Plan (VII-1349), but the Court by interlocutory decree entered March 6, 1944 (VII-1158 *et seq.*) approved the District's amended plan, and authorized, *inter alia*, the payment of 56.918 cents on the unpaid dollar for the District's bonds with all coupons attached. (Note: The Committee had sold such bonds to the syndicate of the Ranson-Davidson Company, *et al.*, at 56.866 cents on the dollar. The difference between that sum and the amount allowed by the Court provided for the carrying charges of the R. F. C. which held the bonds in the interim. Furthermore the District paid to the syndicate for its services, the sum of $112,000.)

On July 23, 1942, the Committee wrote Kelley (VII-1347) asking if he were going to accept delivery of his bonds, etc., under the terms of the Committee's letter to him of September 8, 1941 (see above).

On August 19, 1942, the attorney for plaintiffs replied by letter to the Committee (VII-1348) to the effect that plaintiffs would not sign any release of the Committee as a condition to accepting delivery of their bonds.

On or about September 2, 1943, Mr. R. O. Holloway, an attorney of the City of Toledo, representing the plain-

tiffs, had a conference in Toledo with Mr. H. C. Rorick, as Chairman of the Bondholders' Protective Committee, (VII-1288) but they failed to reach any agreement on the matters in controversy.

(16) On November 1, 1943, the plaintiffs filed their complaint in the instant case. (I-2 *et seq.*)

On December 30, 1943, the defendants filed their answer and cross (counter) claim. (I-39 *et seq.*)

On April 28, 1944, the Court below granted in part a motion of the plaintiffs for judgment on the pleadings and ordered the defendants to deliver the bonds, etc., in question to plaintiffs, and also to deliver to plaintiffs an itemized accounting of its receipts, expenditures and disbursements, "the court retaining jurisdiction herein to make such further orders respecting such accounting and other matters not herein disposed of after this order of the court has been complied with, or may be equalitable and proper." (I-117.)

On May 31, 1944, the defendants, in compliance with the court's order, delivered the bonds, etc., in question to plaintiffs (VII-1291) and on July 1, 1944, delivered to plaintiffs the account of its receipts, expenditures and disbursements which was ordered by the court (VI-595).

On October 30, 1944, the Court referred the matter to Mr. Fred H. Kruse, as Special Master, for the taking of testimony on the subjects of damages, accounting, and defendants' claim for additional compensation, and to make findings of fact and conclusions of law. (I-124.)

(17) The first decree of the United States Bankruptcy Court confirming the District's Plan of Composition (see above) was, on appeal by the plaintiffs herein, (who had opposed the same in said proceedings,) sent back to the trial court for further findings, etc. After the trial court had conducted further hearings, and again confirmed the District's Plan of Composition, and the plaintiffs

herein had given a notice of appeal therein, (Plffs.' Exhibit 23) the District, acting through B. J. VanIngen & Company, Inc., (of the same syndicate which bought the Committee's bonds) made a settlement with the plaintiffs. By such settlement B. J. VanIngen & Company, Inc., purchased plaintiffs' bonds from them for $199,650.42, which was exactly $75,000 more than the Court had found the District should pay for the same under the Plan of Composition. (VII-1291, II-5.) A new contract between the Everglades Board and the syndicate dated May 3, 1944, gave the syndicate an additional $90,000 in fees. This was the same date that the plaintiffs were paid the additional $75,000 for their bonds, and is obviously the means used by the District to pay plaintiffs the $75,000 more than was received by other bondholders. (V-1240, 1241.) The bonds so purchased from plaintiffs by B. J. VanIngen & Co., Inc., were then surrendered under the Plan of Composition, for 56.918 cents on the dollar, the same amount as paid for all other bonds.

VII.

EXTENSION OF ARGUMENT

1. The Special Master's Report

The Report of the Special Master (I-153) is in itself evidence of the completeness and thoroughness with which the case was tried and considered. Every issue is covered in detail, and much of the evidence upon which its findings are predicated are reviewed and summarized. This Report virtually makes a brief unnecessary herein, and shows fully the inevitableness of the conclusions reached. Upon a lengthy oral hearing and submission of briefs, the Court below approved and confirmed the Special Master's Report in all particulars and adopted it as its own. No extensive citation of authorities need be given to this court as to the

weight given by an Appellate Court to such a report and confirmation. (*Mills Novelty Co. vs. Monarch Tool & Manufacturing Co.*, 49 F. 2d 28; *A. O. Smith Corporation vs. Petroleum Iron Works Co.*, 73 F. 2d 531, *F. R. C. P. Rule* 52 (a).)

2. Issues

Inasmuch as the plaintiffs received from the Committee a return of the identical bonds represented by their Certificates of Deposit, the only questions left for determination in the Court below were, (1) whether the assessment of $35.00 per bond, made by the Committee for its services, expenses, liabilities, etc., was fraudulent, (2) whether there was an unjustifiable delay in returning plaintiffs' bonds to them and if so, did plaintiffs suffer any damage therefrom, and (3) whether the defendant Committee was entitled to any additional compensation. In Vol. II, page 306, the Special Master summarized the issues.

3. The $35.00 Per Bond Assessment

At the request of the Special Master (II-193) the defendants prepared a schedule showing the justification for the $35.00 per bond which they charged the plaintiffs. This schedule is Defendants' Exhibit 52 (VI-748). It shows that, on the basis of the information which the Committee had at the time the plaintiffs elected to withdraw, the charge should have been $41.86 per bond, but Mr. H. C. Rorick testified (II-272, 462; III-269) that because of some funds, then $22,400, in the distribution accounts, which might not all have to be ultimately disbursed, and because some estimated liabilities might be later reduced, the charge of $35.00 per bond was made instead of $41.86. Finally, the same charge of $35.00 per bond was made from the non-withdrawing depositors also (III-440).

Under the provisions of the Deposit Agreement to which reference has hereinabove been made, the Committee was to be compensated for its labors. The fixing of such compensation was to be by the Committee itself. Of course, the Committee would be charged with good faith in the fixing of such compensation, but its acts in so doing would have to amount to a constructive fraud to invalidate it. In any event, the record here is replete with evidence that the charge of the Committee was well within all reasonable limits of fair compensation.

There are so many authorities on the subject of the exercise of discretionary power by trustees that it probably is advisable here to quote only a condensed statement of the law as found in the following:

Restatement of the Law, Trusts, page 481, Section 187 (e).

"*No abuse of discretion.* If discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment. The mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently, is not a sufficient reason for interfering with the exercise of the power by the trustee."

26 R. C. L., page 1373, titled "Trusts," Section 234.

"*Supervisory Power of Court Over Discretionary Acts.*—Formerly courts of equity supervised and controlled the exercise of discretionary powers by trustees. But it is now a well settled principle that a trustee having the power to exercise discretion will not be interfered with by the court so long as he is acting bona fide. To do so would be to substitute the discretion of the court for that of the trustee." (See note in 8 L. R. A. N. S. 398)

Page 1392, titled "Trusts," Section 258.

"*Amount of Compensation.*—The question of what is a reasonable compensation for trustees depends largely on the circumstances of each particular case, and cannot be properly determined by any inflexible rule. While in practice it is usually claimed and awarded in the form of a commission, the rate is not usually determined by any established rule. The general rule running through all of the cases is that a trustee should receive a compensation adequate to his care and trouble. Such compensation is proportioned to responsibility incurred and to the labor and care bestowed."

4. **Actual Cost to Plaintiffs Was Only $15.00 Per Bond**

Prior to plaintiffs' withdrawal of their bonds, there had been paid thereon the sum of $20.00 per bond out of collections which had been received out of judgments secured and collected by the Committee. When the bonds were returned to plaintiffs, they also received an assignment of their pro rata share of the second judgment. The bonds, unpaid coupons, and interest in the second judgment referred to above, which the plaintiffs received from the Committee on May 31, 1944, then had, and on June 6, 1941 had, exactly the same market value as a like amount of Everglades bonds with the January 1, 1931, and all subsequent coupons attached. The plaintiffs received from the syndicate which purchased their bonds (in order to prevent further delay in the District's bankruptcy proceedings) $75,000 more than the price paid all other bondholders for bonds with unpaid coupons of January 1, 1931, *et seq.* attached. No deduction having been made for coupons merged in the second judgment, or for the $20.00 per bond theretofore paid, the net cost to plaintiffs for the Committee's services was actually only $15.00 per bond. (II-205, 206; V-1211, 1212, 1293, 1319, 1320, 1337.)

5. Sale of Bonds by the Committee

The record is replete with evidence sustaining the wisdom of the Committee in recommending a sale of the bonds in question at $568.66 per bond. Whether it was or was not an advantageous sale is not in issue here, as the plaintiffs did not confirm the sale, and received a return of their bonds. (See comment of Special Master on this subject, Vol. II, page 337.) However, the wisdom of the sale is clearly shown by the following facts:

(a) Over 97% of all depositing bondholders confirmed the sale. (I-214; II-529; V-1326.)

(b) The market price on the bonds one month before the sale was only 33 flat. The price had been as low as 8. (II-163; III-535; IV-666, 703, 709, 716.)

(c) The Reconstruction Finance Corporation, after a survey of the District, refused to loan to the District more than 30c on the dollar to retire the bonds, and then only on condition that the District pay not over a total of 38c flat to the bondholders. (II-229; IV-741, 744; V-958.)

(d) The Bankruptcy Court found the price paid by the District to be fair and proper.

(e) Either a sale had to be made on some fair basis or else expensive litigation would have to be carried on for years. The District steadfastly and adamantly refused to make any kind of refunding. (II-228; III-239, 250; IV-621, 734; V-1261.)

(f) Some large holders of bonds had recommended to the Committee that it sell the bonds at as low as 30c on the dollar. (IV-718.)

(g) Mr. W. Turner Wallis, a witness for the plaintiffs whose deposition was taken, said of the sale, "It was my opinion at that time that it was a very good settlement to the holders of the bonds." (V-961.)

(h) Even plaintiffs' bonds which were bought from them by the syndicate for $75,000 over the price received by other bondholders, in order to stop their opposition to the bankruptcy suit (under guise of paying them more for their bonds), were then retired by the District in its bankruptcy proceeding for $568.19 per bond. (See Special Master's Report I-212 on the subject of the District's Bankruptcy Proceedings.)

6. Value of Committee's Services

The plaintiffs alleged in their complaint that the fees charged them by the Committee were "so excessive and exhorbitant as to be fraudulent and clearly violative of the provisions" of the Deposit Agreement. The plaintiffs recognize that this case is not one to fix the amount of fees charged, but only to determine whether the fees fixed were fraudulent. The Deposit Agreement (I-94) specifically provided for compensation for the Committee and its employees, and empowered the Committee to fix such compensation.

Almost the entire record is on the subject of the services of the Committee. A resume of such services can be found in the twenty-two reports rendered by the Committee to the depositing bondholders, being Defendants' Exhibits 1 to 22, inclusive.

The elements commonly accepted for consideration in the value of services such as those rendered by the Bondholders' Protective Committee are (a) the ability of the members, (b) the time expended, (c) the diligence displayed, (d) the results accomplished, and (e) whether the compensation was certain or contingent. Ample evidence was introduced on all these elements.

No more able men could have been chosen to be members of the Committee than H. C. Rorick, J. R. Easton and

Walter H. Lippincott, the original members thereof. Mr. Rorick had a detailed and intimate knowledge of the history of the Everglades District, its possibilities and development, the laws relating to it and its bonds, and a familiarity with the entire situation unequalled by any other person. Mr. Rorick was also one of the outstanding men of the country in the municipal bond field. He also had had extensive experience in dealing with districts when bond defaults had occurred, and knew what remedies were available, and what the best practical methods were in dealing with such defaulting districts. Mr. Easton also had a long personal experience of over thirty years in the bond business and an intimate knowledge of the entire Everglades situation. Mr. Lippincott was a prominent and able bondman, being the senior partner in Bioran & Co., a large bondhouse which had marketed a large amount of the bonds.

All members of the Committee either owned or directly represented the owners of large blocks of the bonds, and hence had a direct personal interest in securing the best possible results for the bondholders. Later, upon the death of Mr. Lippincott, Joseph B. Grundy was appointed to fill the vacancy on the Committee. Mr. Grundy was a man of broad business experience, and owned and represented the owners of a large amount of the bonds in question. (II-294.)

From the outset the Committee worked diligently, vigorously and unceasingly in the interest of the bondholders. For over ten and a half years Mr. Rorick devoted over half of his time to the Committee. (II-115.) The testimony showed that Mr. Rorick had an earning capacity of $100,000 to $150,000 a year, and his services as a consultant only were contracted for as high as $50,000 a year (see Defendants' Exhibit No. 49, and testimony of H. C. Rorick). Mr. Easton and Mr. Marvin H. Rorick, Secretary

of the Committee, as shown by the evidence (II-115), devoted over one-third of their time to the work of the Committee. Both of these men had a high earning capacity because of their long experience and their special abilities in banking and bond businesses. (III-260, 262, 263.) The amounts charged by the Committee for their services were far below the amounts they earned in their own businesses by the expenditure of the same amount of time which they gave to the Committee's work.

The results obtained were excellent and met with the approval of all the depositing bondholders, except plaintiffs and the holders of about $15,000 of other bonds. The plan of composition in the later bankruptcy proceedings of the District provided for a payment of 56.918 cents on the dollar on the principal of the outstanding bonds, which was found by the Court to be a fair price. The evidence showed that the District had threatened continued resistance to, and refusal of, payments on the bonds, which would have been very expensive and would have delayed payments for a long time. The previous experience of the Committee indicated the high cost of collections in relation to the amounts collected. The settlement ended litigation and brought immediate cash to the bondholders in excess of the prevailing market price of the bonds.

The compensation of the Committee could not be said to have been wholly contingent, as the bonds had some value at least. But the Deposit Agreement provided that no assessments could be made against the bondholders, and the members of the Committee individually, and the Depositary, financed the operations of the Committee by loans, at a time when it would have been impossible to get such loans from regular banking sources. If the Committee had not brought the value of the bonds up to a reasonable price, their compensation would have been practically nothing.

Some attempt was made by plaintiffs to show that the compensation paid in some other taxing districts, for refunding processes, was less than that charged by the defendant Committee. The testimony offered was incompetent, as it consisted of oral statements by a witness concerning written documents, none of which were produced. But giving the testimony the greatest weight possible, it did not consist of any evidence to sustain plaintiffs' claims. The situations were not comparable, because (1) No taxing district had the complicated problems present in the Everglades District, as hereinabove shown, (2) Refunding agents have much less work than Protective Committees, because the taxing districts work in harmony with the refunding agents; in fact, they employ them, (3) None of the instances referred to in plaintiffs' evidence covered as long a period of time as the Everglades matter, and (4) The refunding agents (generally R. E. Crummer and Co.) received collateral benefits, from first buying the defaulted bonds on a very low market before refunding operations began and often requiring the bondholders to sell coupons to them on a much lower basis than that upon which they were being refunded. (III-429, V-1271 and 1309.)

On the subject of the value of the Committee's services, the Special Master found as follows: (I-27) "The compensation to the members of the committee, its attorneys, agents, employees and depositary and their expenses and liabilities were reasonable in view of the importance of the questions involved, the work done, the responsibilities incurred, the difficulties of the problems presented, the amount involved, the skill and ability with which the matters entrusted to the committee were handled, the length of time such services were rendered, the contingency of payment and reimbursement, and the results accomplished."

For the thirty-five dollars per bond which plaintiffs paid, they received (1) ten and one-half years of service by the Committee, its Depositary, its lawyers and employees; (2) the protection of the validity and integrity of their bonds, which would have become virtually worthless if the Committee had not, by litigation, attacked and defeated the unconstitutional statutes passed by the Florida legislature, and further compelled the performance by some of the Florida officials of their duties to levy and collect taxes; and (3) the benefits of the Committee's actions which finally forced the District to a position where it was compelled to do something reasonable to retire its bonds on a basis much in excess of the then market value of the bonds.

7. Litigation Instituted or Given Attention by the Committee

The most audacious part of plaintiffs' brief (pgs 25-32, inc.) is that in which an unsupported attack is made upon the litigation which was instituted by the Committee, and the attention it gave to other litigation which affected the rights of the bondholders. The Committee had chosen as its chief counsel an outstanding lawyer of New York, Mr. William Roberts. (II-200.) Mr. Roberts' own deposition (IV-751 to 859) shows conclusively his grasp of the problems faced by the Committee, and the excellent way in which he attacked them. In addition to Mr. Roberts, the Committee chose Mr. W. H. Watson of Pensacola, Florida, as associate counsel in Florida. Mr. Horton C. Rorick testified that Mr. Watson had a very high reputation as a lawyer and was a man of high character. At this point, Mr. Pleus, plaintiffs' attorney, said, "We are perfectly willing to stipulate that is absolutely true." (II-176.)

Having carefully chosen competent and exceptionally

able counsel, the Committee thereupon took all of its actions upon the advice of such counsel. (II-198.)

Under the summary of facts contained hereinabove, reference has been made to the places in the record, including the Special Master's Report, wherein the forty-five cases are described and evaluated. There can be no question but what this litigation led up to, and made possible, not only the sale of the bonds made by the Committee, but also the sale by plaintiffs of their bonds was made possible. Otherwise, the bills passed by the Florida legislature and the actions of the State and District officials would have made the bonds valueless. (II-206; IV-717.)

8. Plaintiff's Witnesses

Because of the wealth of evidence supporting all of the Special Master's findings and conclusions, which in turn were sustained by the court, there need be little, if any, comment made upon the paucity and weakness of the evidence introduced by the plaintiffs.

One Archibald B. Morrison (V-986 *et seq.*) a dealer in municipal bonds of Miami, Florida, attempted to testify that the amount of fees charged by the Committee was high in comparison with fees charged by refunding agents and bondholders' committees in some refunding operations in other taxing districts of Florida. Most of his testimony was held incompetent by the Master, but plaintiffs' attorney was allowed to take witness' statement for the record. At many places in the record, such as Vol. III, page 429, and Vol. V, pages 1271 and 1309, defendants showed the great difference between the problems which arose in the Everglades Drainage District and those of municipal subdivisions such as Mr. Morrison testified about. (See also comment of Special Master on this point, Vol. 1, page 181.) In commenting on Mr. Morrison's testimony, the Special

Master said (I-171), "He testified that his information as to the principal activities of the committee was obtained from reports to bondholders plus such information as appeared from time to time in the newspapers. It would not seem that this witness had sufficient information upon which to express a well considered opinion which would be of material value as to the reasonableness of the charge of the bondholders' committee in this case for expenses and services, as provided in the deposit agreement, and it would appear that the opinion of the witness that the committee at the time of the settlement could have forced the district to make a better compromise than $500.00 per bond with interest at 4% from January 1, 1938, was based on mere speculation."

One August J. Hurt was produced by plaintiffs as their witness. (V-905 *et seq.*) Mr. Hurt is an employe of The First National Bank of Chicago, and he testified that he believed his bank would have performed the work of the Depositary for between $20,000 and $22,000. (V.-915.) However, he said that such estimate was based on the assumption that the work would cover about five years (I-928), whereas the work of the Depositary in the instant case covered over ten and one-half years. On pages 915 and 916 of Volume V, Mr. Hurt further said, in respect to the bill of the Depositary, "I am not quarreling with the way this bill was prepared. It was undoubtedly prepared on a schedule which we at times called the Eastern Schedule. * * * Now this Eastern Schedule I have seen it and I am certain that this is the schedule that was used in preparing this statement submitted by Spitzer-Rorick as depositary." Therefore, on the basis of Mr. Hurt's own testimony, the bill of Spitzer-Rorick Trust & Savings Bank would have been justified in excess of the $40,000 it charged. The defendants, on the other hand, presented as a witness Stephen J. Balog, (V-870 *et seq.*) a vice president of The Toledo

Trust Company of Toledo, Ohio, who testified that the depositary's fees were very reasonable and conformed with the American Bankers Association rate of computing fees. (V-875.) (See A. B. A. Schedule, Defts.' Ex. 100, VI-816.) In fact, Mr. Balog testified (V-885) that the full fee, computed on the said schedule of the American Bankers Association, would be in excess of $60,000.

The plaintiffs called I. R. Miller (V-902) as a witness. Mr. Miller is a certified public accountant. His testimony is well summarized by the Special Master (I-167) as follows: "He identified and explained his computation in Plaintiffs' Exhibit 18 prepared by him, containing a recapitulation of Defendants' Exhibits 19, 24 and 53, purporting to show that the Committee should have on hand or that it had not accounted for $136,432.34, and was later recalled and testified as to Plaintiffs' Exhibit 21, a computation prepared by him of the costs of liquidation by the Committee, purporting to show moneys unaccounted for by the Committee of $75,361.29. He stated there was nothing in his statement that changed any figures in the account of the Committee and that he did not take into consideration the unpaid liabilities of the Committee, as shown on Plaintiff's Exhibit 51. The answers of the witness on cross-examination indicate that not much value can be placed upon this computation. We are unable to see how the statements of this witness in any way affect the validity of the account of the Committee or the rights of the plaintiffs as of July 1, 1941, under the terms of the Deposit Agreement." The witness said on cross-examination (V-1061) that his figures reconciled with Defendants' Exhibit 24 (Defendants' Accounting). On page 1064, Vol. V, the witness said, "As far as your report is concerned, it is right as of this minute." On page 1065 he said, "If the court were to hire me, I would go into a lot of other things, such as some of the amounts I have to leave in

mid-air. I think if I were hired by the court, they would probably be explainable. I don't know." (See also testimony of H. C. Rorick, V-1317, 1318, about Plff.s' Ex. 51.)

The plaintiffs also introduced the depositions of K. M. Throop (V-936), W. Turner Wallis (V-947), and Millard B. Conklin (V-970). Mr. Throop was secretary and treasurer for a time of the Everglades Drainage District. He testified as to some of the accounts of the District. Mr. Wallis was for a time with the District as manager of its tax department, and as engineer and general manager. He testified as to his recollection of certain statements made at the meeting at Thomasville, Georgia, in August, 1941, hereinabove referred to in our statement of facts. Mr. Conklin testified that he was an assistant attorney-general of Florida on March 6, 1941, and attended the meeting at Thomasville above referred to. He identified certain minutes which he said he kept of the meeting.

None of the depositions are of any importance as bearing on the issues herein. They relate to alleged details in the negotiations leading up to the sale of bonds by the Committee. Since plaintiffs did not ratify the sale of their bonds and withdrew them from the Committee, they are not interested in the sale.

9. The Accounting by the Committee.

Pursuant to the order of the trial court, made at the time the court ordered the delivery of the bonds to plaintiffs, the defendants furnished plaintiffs with a detailed account of the Committee's receipts and disbursements (Defendants' Exhibit No. 24, VI-595 *et seq.*) from its inception to July 1, 1941. The defendants assumed the burden of proving the items, and produced bills, vouchers and canceled checks for all items disbursed. Plaintiffs' counsel seeks to complain that the accounting procedures are not in the form he would like. The records, however, show

all bonds deposited, all disbursements made, and all money received. Mr. Marvin H. Rorick testified as to the nature of the records which were kept. Mr. Horton C. Rorick also testified about the records (III-267, 271, and elsewhere throughout the record). The Deposit Agreement (I-96) provided that the accounting of the Committee should be "an account of its receipts and disbursements."

The Special Master (I-246) found that "the defendants have furnished to the plaintiffs, as ordered by the court, and filed in this proceeding, an itemized, complete and accurate accounting, showing all receipts and expenditures, including fees for personal services rendered by each, and a statement of all unpaid liabilities, as of July 1, 1941, the date of withdrawal by the plaintiffs, together with vouchers evidencing the disbursements."

Plaintiffs repeatedly contended that the accounting should go beyond the effective date of their withdrawal. In this they were properly overruled by the Special Master. The trial judge concurred with the Special Master's opinion in this respect (I-312). In the court's memorandum on the motion for judgment on the pleadings, the court, in ordering the accounting by defendants, said (I-116), "The withdrawal of the depositor from the agreement must be held to be a termination of the agreement as to him, entitling him to an account *at that time.*" (Italics supplied.) It is too obvious for comment that the Committee, under any circumstances, would be accountable to the plaintiffs only up to the time they ceased to represent the plaintiffs. (See Special Master's statement on this point, III-349.) It is shown, incidentally, by the reports to bondholders after that date (Defendants' Exhibits 20, 21, and 22) that the transactions after the date of plaintiffs' withdrawal consisted in collecting the sale price of the bonds (in which plaintiffs had no interest) and disbursing them. However, the Special Master did order the defendants to show what

payments they actually made after the plaintiffs' withdrawal, upon the estimated liabilities of the Committee which had entered into the computation of the $35.00 charged the plaintiffs. (See Defendants' Exhibit 51, VI-746.) The defendants also produced all correspondence on that subject. Furthermore, all minutes of the Committee were produced up to the time of plaintiffs' withdrawal, and the remaining minutes, on order of the Special Master, were subjected to plaintiffs' examination. (III-361, 362.)

Plaintiffs also made repeated attempts to be allowed to see the records which would give them the names and addresses of the depositing bondholders. The plaintiff H. W. Kelley is an employee of R. E. Crummer and Co. This was testified to by Mr. Pleus, the attorney for the plaintiffs, who was called as a witness by defendants (IV-693, 694) because *no plaintiff ever attended any of the hearings nor submitted himself for cross examination.* R. E. Crummer and Co. is a rival bondhouse, and a list of the bondholders would give them a list of the customers of Spitzer-Rorick & Company, who had bought these Florida bonds. It has been uniformly held that no such disclosure is allowed when not necessary to the issues, and the Special Master ruled it was not necessary in this case. (III-319, 382, 384, 545; V-867.) All of the ultimate and final records as to receipts and disbursements, debits and credits to bank accounts, etc., had been produced by the defendants. It would not throw any light on the issues to reveal the names of the bondholders. The total of bonds deposited by them, and the totals of all moneys paid them, and other facts relating thereto had already been shown by competent evidence. However, the Special Master on many occasions offered to appoint a Certified Public Accountant to check the records of the individual bondholders and reconcile it with the ultimate figures already produced. (See III-319, 382, 384, 545, 547, 553; IV-598; V-868, 870.) The Master even

went so far as to designate Mr. Cyril Wideman, a certified public accountant of Toledo, whom he would choose to make such examination if plaintiffs wanted it made. Mr. Wideman was taken to the Depositary's office, and in the presence of plaintiffs' counsel was shown the nature and volume of such records, including cards recording some 11,000 bondholders' certificates. (V-869, 1321, 1340.) The plaintiffs, however, refused to be satisfied with anything less than a disclosure to them of the names of the bondholders. Mr. Holloway, counsel for the plaintiffs, said that plaintiffs would not be satisfied with an accountant's examination of such records, (IV-600, V-1024) and plaintiffs finally rested without accepting the Special Master's offer to have such an examination made.

Incidentally, the testimony of Mr. H. C. Rorick (V-1252, 1253) disclosed that R. E. Crummer and Co., and other persons apparently associated with them, had in three previous and separate suits sought to obtain this list of bondholders, but in each case had been unsuccessful. (II-192; V-1252, 1253.) One of plaintiff's own witnesses, Mr. Morrison, testified (V-1027) that the list of Spitzer, Rorick & Co.'s customers would be of value to R. E. Crummer & Co., although he attempted to minimize such value. Mr. H. C. Rorick testified on the same subject.

The appellants have complained that the Statement of Account (Defendants' Exhibit 24) did not contain information concerning an account in the Central Farmers Trust Company of West Palm Beach, Florida, and have claimed that information about this account was "discovered" by plaintiffs upon cross-examination. The fact is that information about this account was volunteered by defendant Marvin H. Rorick, upon direct examination, before any cross-examination whatsoever, (I-92, 93) as follows:

"Q. Mr. Rorick, you may state whether or not at any time there were funds in the Central Farmers Trust Company, of West Palm Beach, Florida, which were in an account there either in the name of the bondholders committee or with which the committee had some connection? A. Yes, there were.

"Q. You may state whether or not you have with you any statement from that bank of receipts and deposits in that account? A. Yes, I have.

"Q. You may explain, if you will, the existence of that account, what it was and something about it. A. An account was opened in the Central Farmers Trust Company, pursuant to an Agreement made by the Florida Everglades Drainage District Bondholders' Protective Committee and the Board of Commissioners of Everglades Drainage District."

The said contract was then introduced in evidence as Defendants' Exhibit 33 (VI-699). Other similar contracts are shown at Vol. VII-1126, *et seq.* (See H. C. Rorick testimony on this subject V-1171, 1172.)

The purpose and necessity of the contracts were explained by Mr. H. C. Rorick (II-215; V-1169, 1172). This matter was also testified to by Mr. Marvin H. Rorick (III-277, 278, 279, 280), whose written statement concerning the same which was introduced as Defendants' Exhibit 53 (VI-751). On pages 279, 280, 281, 282, Vol. III, Mr. Marvin H. Rorick testified as to the transfer of the balance of $29,269 in the account to a new account in Central Farmers Trust Company. Witness had bank statements and checks for inspection relating to this account. The net result was a 90c overdraft in the account. (III-282.) In order to get the District to continue operations, the Committee agreed by said contracts that out of some funds which would otherwise be required for payments on the bonds, the Committee would allow the District enough for its operating expenses and to repair the locks which were necessary in the opera-

tion of the drainage system. Otherwise the District had threatened to "fold up." The money for this purpose was deposited in the Central Farmers Trust Company of West Palm Beach, Florida.

It is obvious that accounting was allowed in this case solely as a matter of discovery. The other circumstances under which accounting is allowed, such as where there is great complexity in mutual accounts or difficulty in arriving at the facts in a law case, are not present here. (See page 43 of the Opinion of Judge Hamilton in *Gillespie vs. Schram*, C. C. A. 6th, 108 F. 2d 39.) Where discovery is sought, the courts have always been sensitive to protecting the witness or defendant from the revelation of confidential matters which are not necessary to a determination of the case. (See Wigmore on Evidence, 3rd Edition, Vol. VIII, Sec. 2212.) In the section of Wigmore referred to, the author quotes a leading expression of the principle involved which is also quoted in a large number of other cases on the subject and is probably the leading statement on this subject:

> "1870, Hatherly, L. C., in *Moore vs. Craven*, L. R. 7 Cr. App. 97, note: 'The court does not, when discovery is a matter of indifference to the defendant, weigh in golden scales the questions of materiality or immateriality; but where the nature of the discovery required is such that the giving of it may be prejudicial to the defendant, the court takes into consideration the special circumstances of the case, and whilst, on the one hand, it takes care that the plaintiff obtains all the discovery which can be of use to him, on the other, it is bound to protect the defendant against undue inquisition into his affairs. The question of materiality must be tested by reference to the case made by the plaintiff's pleadings, and to what will be in issue at the hearing.'"

The author then goes on to say:

"The simple expedient of restricting the disclosure to the judge or his delegate will usually prevent whatever detriment might otherwise be incurred by forcing a public revelation of the trade secret.

"(1) What the state of the law actually is would be difficult to formulate precisely. It is clear that no absolute privilege for trade secrets is recognized. On the other hand, courts are apt not to require the disclosure except in such cases and to such extent as may appear to be indispensable for the ascertainment of truth. More than this, in definition, can hardly be ventured."

In a footnote to said section it is said:

"A *disclosure in camera* to the judge is peculiarly the appropriate means of preserving the privilege yet giving redress where a *plaintiff* sues for infringement."

The same subject is considered in Corpus Juris Volume 70, page 743. In a footnote thereto, reference is made to the fact that the *names of customers* are among the trade secrets which have been held to be within the privilege.

10. As to Time of Delivery of Bonds

Plaintiffs have complained because of the delay in the delivery of their bonds to them, and alleged that such delay was unjustified. In plaintiffs' brief there are even many characterizations such as "conversion," because plaintiffs' bonds were first included in the conditional sale of bonds made by the Committee to the syndicate. The sale was conditional, because the syndicate was advised that the Committee could not sell the bonds of any depositor unless he consented thereto, and the syndicate agreed to secure the return to the Committee of any bonds whose owners did not consent to the sale. In the state-

ment of facts hereinbefore contained, reference is made to the correspondence which took place between the Committee and the plaintiffs and their lawyers. The Committee always acknowledged the right of plaintiffs to the return of their bonds and took immediate and vigorous steps to get them. Plaintiffs insisted upon the return of the identical bonds represented by their Certificates of Deposit, and such were received by them. No conversion could, or did, result under these circumstances, and plaintiffs' complaint herein is not based upon conversion. The complaint asked only (1) for a return of plaintiffs' bonds, (2) for an accounting, and (3) for damages for alleged wrongful detention. These all negative any claim of conversion.

As shown by the correspondence between the parties above referred to, the Committee, being advised of plaintiffs' belligerent attitude and even threats of litigation, believed that as Trustees they were entitled to the protection of having all matters in controversy between them and these non-resident depositors determined concurrently with the redelivery of their bonds. If unjustified litigation were to ensue, the Committee could not terminate the trust and make distribution of all moneys to the non-withdrawing bondholders and the bonds to plaintiffs, or it would then have no funds in the trust with which to defend. It would be inequitable to the non-withdrawing depositors to deliver plaintiffs' bonds to them, and then pay the costs of litigation out of the funds of the non-withdrawing depositors. The Deposit Agreement, Article VI, Section 6, (I-93) provided that the members of the Committee should not be personally liable except for their own willful misconduct. Said Article further provided that the Committee should be fully released and discharged from any and all liabilities to a withdrawing depositor upon the return of his bonds to him. Plaintiffs refused to accept a return

of their bonds as a release of the Committee, and the Committee therefore held the bonds until they could get the protection of a court of equity. The non-residence and divergent residences of the plaintiffs prevented the Committee from bringing them into one jurisdiction for the determination of these questions, and hence the Committee invited plaintiffs to institute such a suit, which they did. The defendants were well aware of the previous acts of R. E. Crummer and Co. (of which plaintiff H. W. Kelley was an employee) and others associated with it, to cause defendants all the trouble they could. They had already harassed the Committee in several jurisdictions by suits hereinabove referred to. R. E. Crummer and Tom Cook & Company had tried to get the Committee to take them into the picture, representing that they could arrange a deal whereby some $200,000 in fees could be secured, which they would divide with Spitzer, Rorick & Company. When Mr. Rorick refused to consider any such proposition, Crummer and Cook proceeded to cause the Committee all the trouble they could. (II-230.) The Committee, being thus warned of the nature of the opposition they faced, wanted the protection of a court of equity, which they received in this case. By counter-claim herein the defendants asked the advice and direction of the court. All parties now being subject to the jurisdiction of the court, the defendants were instructed to return the bonds to plaintiffs, and the court would retain the case for the determination of all other issues, and thus the Committee would have full protection.

Under these and other circumstances shown throughout the record, the Special Master found (I-248) as follows:

> "5. Under the facts and the terms of the Deposit Agreement, *the defendants were justified in withholding the return of the bonds and coupons* held by the plaintiffs and deposited with the Committee

pending the instructions of the court with reference thereto, and the plaintiffs are not entitled to recover any damages by reason of any delay in such return." (Italics supplied.)

The Special Master had ample substantiation for this finding, and it was approved and adopted by the court.

11. As to Claims for Damages

This section of our brief could well be omitted, because since there was no wrongful withholding of plaintiffs' bonds, there could be no damages therefrom. However, we may point out that even if the withholding had been unjustified, plaintiffs suffered no damages therefrom. The rule of damages for the wrongful withholding of negotiable securities is the loss in their value between the time of the wrongful withholding thereof and the time of delivery (plus of course any interest or dividends paid to the withholder in the interim). The cases cited by plaintiffs on the subject of damages refer only to the wrongful withholding of tangible property, or the means of determining the *amount* of damages, when actual damages are shown to have resulted, or must be conclusively presumed to have resulted. None of them apply to cases where it is affirmatively shown that no damages resulted. The law never presumes or creates damages where none otherwise exist.

The case of *McDonald vs. McKinnon*, 104 Mich. 428, states the rule of damages when the question of redelivery, or failure of delivery, of negotiable securities is involved. In that case the securities consisted of stock. The court held that if the stock had been converted by defendant to his own use, and not redelivered to plaintiff, then the measure of damages would be the value of the stock at the time of the conversion with interest to date, but if the stock was redelivered to plaintiff, then the damages would

be the depreciation in the value of the stock when delivered under its value when redelivery should have been made. To the same effect, see *Englehart vs. Cassatt*, 305 Pa. 117, 157 A. 256, and *Allen vs. Blyth*, 173 Wash. 409, 23 P. 2d 567.

The general rule as to damages caused by delay in the performance of a contract is stated in 15 American Jurisprudence, page 447, as follows:

> "The measure of damages for delaying in performance of their contract or failure to perform it within the time agreed upon is the actual loss sustained by reason of the delay. If the contract provides no remedy by way of liquidated damages, the damages must be established by evidence showing actual damages and the actual or approximate amount thereof; * * *."

In the instant case there was of course no depreciation in the value of the bonds from the time when plaintiffs requested redelivery thereof until the time when actual delivery was made, and in the meantime no interest had been paid thereon. In fact, the plaintiffs upon receipt of the bonds sold the same for $75,000 more than the market value thereof. True, the $75,000 was really paid to plaintiffs to prevent their continued opposition to the District's bankruptcy case, but it was paid in the form of a purchase price for the bonds and plaintiffs cannot now complain as to the manner in which payment was made to them.

It is evident that the plaintiff H. W. Kelley did not anticipate or believe that any damages would accrue to him by reason of the Committee's failure to deliver his bonds to him when first requested on June 30, 1941; for it was not until October 13, 1942, that he endorsed and surrendered to the Committee his Certificates of Deposit for $147,000 par value of the bonds owned by him, which endorsement and surrender were a necessary prerequisite

to the withdrawal of these bonds by him. Furthermore, Kelley was overpaid about $1750 for the coupons which had been detached from his bonds and used in securing a judgment thereon. (V-1320.)

The claim of plaintiffs' counsel that exemplary damages should be awarded is even more untenable than their claim for compensatory damages. Exemplary damages are not awarded where there is no injury to sustain compensatory damages (see 25 C. J. S. 713, Sec. 118). Also, exemplary damages are not awarded in an ordinary breach of contract case, irrespective of the motive on the part of the defendant which prompted the breach. (See 25 C. J. S. 716, Sec. 120.) And furthermore, there was absolutely no showing in this case that defendants acted with any malice whatsoever.

12. As to Petitioners' Brief

It would be impossible, in a brief of reasonable length, to take up, *seriatim*, the numberless statements in Petitioners' brief which are unsupported by the evidence and often contrary thereto, and which are misleading and confusing. For that reason, we have met the situation in this brief by giving a direct, positive statement of the facts as disclosed by the record, and by so doing have been able, within a smaller limit of space, to give the court a true picture of the entire situation.

However, we wish to mention a very few of the erroneous statements, conclusions, impressions, and characterizations contained in Petitioners' brief.

In the first place, the brief, by its very structure, seeks to conceal the fact that outside of a wholly groundless claim for damages, the whole case involves a maximum of only $6,020 for the plaintiff H. W. Kelley and $2,645 for all of the other plaintiffs combined, in the event that for

some unknown reason they were not required to pay anything for the Committee's services or make any contribution to its expenses and liabilities. This consists of the $35.00 per bond which plaintiffs, upon their withdrawal from the Deposit Agreement, paid for the services of the Committee, and their pro rata share of the Committee's expenses and liabilities. It is obvious that there must be some other reason for their prosecuting this case, which reason the record shows quite clearly must be their attempt to obtain a list of the names and addresses of the bondholders who were customers of Spitzer, Rorick & Co., Bioren & Co., *et al.* This case fits into the general pattern of previous cases where the same efforts had been unsuccessfully made.

The only sources of funds which the Committee had were the collections it made from the District and the proceeds of the sale of bonds to the syndicate representing the District. Petitioners, of course, have no interest whatsoever in the funds which came from the sale of the bonds, as they did not confirm the sale and got their bonds back. Out of the funds which the Committee received from the District, they had paid the Petitioners some $1,750 more than the face value of the coupons from plaintiffs' bonds which had been used in the judgments thereon obtained by the Committee. Furthermore, when the Petitioners sold their bonds, no deduction was made by the purchasers from the purchase price thereof because of these payments which Petitioners had received.

The only interest, therefore, which Petitioners could have in the funds which the Committee had collected from the District was that they should properly be expended in payment of the Committee's expenses and applied on the payment of its services. The Committee did account completely for all funds that so came into its hands, and presented bills, vouchers, and cancelled checks for all such

expenditures. At the date that the plaintiffs gave notice of their withdrawal from the Deposit Agreement, (after which the Committee was no longer their Trustee as to funds thereafter received and disbursed) the Committee had on hand in its general account the sum of $3,113.79 (VI-631). It also had a balance in the two distribution accounts of $22,400 out of which it appeared then that it would probably have to make further payments of an unknown amount (VI-639). In computing the Petitioners' share of the Committee's services and expenses, credit was given for the $3,113.79 balance in the Committee's general account (VI-750), and in reducing the charge from $41.86 to $35.00 per bond, the Committee made allowance not only for the $22,400 in the distribution accounts, but also for any other reductions it might obtain in its estimated liabilities. This reduction of $6.86 per bond on the 8,073 bonds then in the Committee's hands meant a total reduction of $43,380.78, which more than covers all items even complained of by the Petitioners, aside from the Committee's charges for its own services, and the payment of the bills of its attorneys. There can be no conceivable ground upon which the Petitioners could ask for an accounting beyond the date of their notice of withdrawal, as the Committee gave them full credit for all moneys then on hand. As to the charges by the Committee for its services, and the fees of its lawyers, so much uncontradicted evidence is in the record that it requires no further discussion. The division of the fees among members of the Committee is of no concern to the Petitioners as long as the total Committee's fees are justified. Petitioners, therefore, have no interest in what part, if any, of the fees is ultimately taken by Committeeman Grundy.

Petitioners' brief is also generally misleading in its attempt to shield the fact that Petitioners are acting for themselves alone. This is not a representative suit and it

was not instituted as one. All other bondholders (except the holders of about $15,000 who apparently did not contest the District's bankruptcy suit) ratified the Committee's sale of their bonds. Distribution was made to them by the Committee to their unanimous satisfaction. Petitioners, therefore, would have no interest in that part of the Committee's action, and they are not entitled to any accounting in respect thereof.

The Petitioners' petition and brief are based on many premises which are not true. This occurs right in the beginning in the statement of "The Questions Involved" (p. 5). The first question is rhetorical. The second question contains the statements (a) that "Respondent Trustees * * * had no intention of accounting to any of the beneficiaries of the trust"; (b) that "there remained in the hands of the trustees, unaccounted for, assets and funds that would never be accounted for and disbursed to the beneficiaries, unless ordered by the court"; (c) that "there was not only constructive but actual fraud against the beneficiaries"; and (f) that "there had been a complete bungling of the affairs of the trust resulting in nothing of value being accomplished for the beneficiaries." All of the above quoted statements are unsupported by, and contrary to, the record. Their premises being wrong, their whole argument based thereon fails.

Throughout the brief, unwarranted characterizations and misdescriptive adjectives are used. A few are as follows:

(Pg. 17) Refers to the Deposit Agreement as "an amazing instrument." There is nothing "amazing" about it. Any lawyer will recognize it as being in the usual form of such documents.

(Pg. 17) "The depositing bondholders have no voice whatsoever." The fact is that the Committee couldn't do

anything with the depositors' bonds, except fully recover thereon, without the bondholders' consent.

(Pg. 18) Says that it was unusual for the Committee members to be entitled to compensation. Such a provision is, of course, very usual as shown in the record.

(Pg. 20) Characterizes the Committee's distribution accounts as "fictitious." There was nothing "fictitious" about them. The Committee twice set aside in distribution accounts the sum of $10.00 per bond for distribution to bondholders. The Committee at the time did not know how many bonds would be deposited and hence had to make provision for all. The so-called "Lawler case," decided April 12, 1937, indicated that the Committee might be liable to all bondholders (V-1173). In any event the Committee, at the time the Petitioners withdrew, had disbursed to depositing bondholders all but $22,400 of these accounts, and it took the balance into consideration in fixing the $35.00 per bond charged Petitioners.

(Pg. 20) Refers to the litigation of the Committee as "a most amazing, futile and childish series of lawsuits and litigation that it is possible to conceive." The record shows the basis and value of all the lawsuits, and that they were instituted as directed by or under the supervision of one of the best lawyers in New York and one of the best in Florida.

(Pg. 23) "The testimony is replete that there is no difference between the Everglades and other situations." The record is directly to the contrary. The evidence on the subject is reviewed in the Special Master's Report.

(Pg. 28) Refers to certain agreements by the Committee with the District as "fraudulent." There was no fraud whatever in them. They were an attempt to keep the District operating and also obtain some collections on the bonds. The only real question about them was whether they were within the power of the District. The actual

result was to benefit both District and bondholders. No one was defrauded.

(Pg. 33) "Misuse of funds." There is no evidence whatsoever of any misuse of funds. On the same page there again occurs the expression "Fictitious Distribution Accounts" about which comments were hereinabove made.

(Pg. 35) The characterizations of the Committee's records ignore the fact that there was no need for the kind of records which plaintiffs' attorney talks about. (III-281.) The Committee had ample, complete, and accurate records of all essential matters, such as record of all deposited bonds, their owners and holders, the amounts paid thereon, the source and amount of all receipts, and the names of all persons to whom disbursements were made, and the amount and purpose thereof.

(Pg. 36) Says that the Committee's account "was so hopelessly inadequate as to make it necessary for plaintiffs to employ a certified public accountant to present to the court some kind of consolidated balance sheet." In the first place, the Committee's account was not inadequate, and in the second place, the plaintiffs did not employ any certified public accountant to present a consolidated balance sheet. The testimony of I. R. Miller, the accountant employed by plaintiffs, showed that he did not audit any accounts of defendants. The statement he prepared was no different from the Committee's figures, and he testified he didn't take into account the Committee's liabilities. The plaintiffs also consistently refused the Special Master's repeated offer to have the Committee's books examined by a certified public accountant to be appointed by him for that purpose.

(Pg. 38) Here, as many places elsewhere, the characterization "wrongful sale and conversion" is used. The evidence is that there was neither a wrongful sale or conversion. The sale the Committee made was one conditioned

upon the consent or ratification of the individual bondholders. The plaintiffs did not ratify, and received a return of their bonds.

(Pg. 53) The heading on this page is "The fraudulent fixing of the $35 per bond charge against Depositors." The evidence certainly shows that there was no fraud in the fixing of the fee, but the heading is indicative of the knowledge by plaintiffs' attorney that the charge as fixed by the Committee was binding if it could not be shown to be fraudulent.

From page 70, the brief, under the heading "Argument" generally reiterates what had been said in the first part of the brief under the guise of being a "statement of facts."

13. Plaintiff's Criticism of the Opinion of the Circuit Court of Appeals

Plaintiffs' criticism of the Court of Appeals opinion, contained on pages 114 to 120 of their brief is unwarranted, unjustified, and often just plainly dishonest.

At the outset of the Committee's work, it requested the deposit with it of only the past due coupons from bonds whose owners they were to represent. The court's statement on page 1571 of the Record that "by July 1931, holders of over $5,000,000 of bonds had deposited past due coupons or bonds and at the time of the sale ten years later holders of well over $8,000,000 in bonds had deposited their bonds and participated in the sale" is exactly in accordance with the evidence. Plaintiffs' references are only to the deposit of the bonds thereunder, which is a patent attempt to mislead this court.

On page 1572 of its opinion the Court of Appeals construed the Deposit Agreement as prohibiting any settlement for less than face value of the bonds without *ratification* by the bondholders. Such a construction is well within the

provisions of the agreement as a reading thereof will show. The *ratification* was of an amendment to the agreement authorizing such sale.

On page 1573 of the Record the Court of Appeals refers to $7,109,000 of bonds *represented* by the Committee. This statement is correct as the Committee represented the bondholders who had then deposited the coupons from their bonds, and later deposited the bonds themselves.

Plaintiffs criticize the statement of the Court of Appeals that the Committee successfully defended the so-called Lawler suit. In the same paragraph in which the court makes this statement, it explains why the result of the Lawler suit was of benefit to the Committee, and in that respect the defense had been successful.

Plaintiffs criticize the statement of the court (page 1573) that the Committee received authorization of the bondholders to make a sale of the bonds. The record shows that over 97% of the bondholders authorized such sale. The court in the same paragraph refers to the right retained by the Committee to repurchase some 15% of the bonds in the case of depositors who might elect to withdraw from the Agreement.

There were no inaccuracies or misrepresentations in defendants' statement of accounting, Exhibit 24, and the court's recapitulation of it on page 1577 is correct.

Plaintiffs say that the court's statement on page 1579 that H. C. Rorick had devoted the major portion of his time over a period of ten and a half years to this project is "hopelessly at variance with the records." This statement by plaintiffs is plainly untrue and dishonest. Mr. Rorick's testimony to this effect (II-115) is nowhere refuted.

The entire testimony was to the effect that the Committee's records were sufficient and accurate, and the testimony regarding the sale of the bonds shows that they

were then in excellent shape, as the court says in its opinion on page 1580 of the record.

Plaintiffs' criticism of the cases cited by the court in its opinion on page 1581 is without weight, as an examination of the cases show that they sustain the court's opinion on the subjects in support of which they are cited.

The court is correct in its interpretation of the Deposit Agreement on pages 1581 and 1582. The fees of the Committee were to be fixed by itself. There is no contrary provision. Of course the fixing of such fees must be fair, and not fraudulent, and the undisputed testimony shows that they were so fixed.

Plaintiffs were never denied access to any competent records to which they were entitled. The statements made by the court as shown on page 1582 are in strict accordance with the record.

The court on page 1583 refers to the relationship of the Committee to all depositors and its duties to depositing bondholders other than plaintiffs. Plaintiffs' criticism of this part of the Court's opinion is without foundation.

No plaintiff ever attended this trial, and plaintiffs' counsel refused to produce any of them. The court's reference to the significance of this on page 1583 is proper.

Plaintiffs say on page 118 of their brief that the court's statement on page 1583 that an offer was made to allow a certified public accountant to examine the records and that plaintiffs did not avail themselves thereof is "simply contrary to the record." This statement by plaintiffs is again pure dishonesty. The record shows several such offers by the Master (III-319, 382, 384, 545, 547, 553; IV-598; V-868, 870). Even the accountant whom the Master would name was designated by him, and he made a preliminary survey of the accounts and records to be examined.

The matter of an alleged "conversion" as referred to on page 119 of plaintiffs' brief has been fully dealt with

elsewhere herein. No issue of conversion is in this case, and there was none. The court's statement on page 1584 that the question of conversion was never presented to the Master or the court is correct. Of course, there was no conversion when the exact property was returned. Even if the Committee had made an unauthorized sale (which it did not) there would have been no conversion when the owner of the property demanded and received a return thereof.

Plaintiffs do not correctly state the facts when they say counsel for the Committee advised the Chairman of the Committee that plaintiffs had an unqualified right to withdraw. (VII-1452.) Counsel was only expressing his opinion that plaintiff Kelley was not precluded from withdrawing because the certificates he claimed to own were not registered in his name. The conditions of withdrawal were not considered.

Plaintiffs further misconstrue the court's statement on page 1584. The court merely confirms the holding of the Master and the District Court, that the Committee's obligations to all bondholders were such that as Trustees they were justified in withholding the delivery of plaintiffs' bonds until a court of equity could examine the matter and give its instructions. Trustees are always entitled to this protection.

As stated at the beginning, plaintiffs' criticism of the opinion of the Court of Appeals is without foundation, entirely unfair, and often plainly incorrect in its statements.

14. Cases Cited By Plaintiff

We have examined the cases and text book references cited by plaintiffs in their brief. It would be a waste of time and space and of no benefit to the court for us to review them here. They relate to (a) duties of Trustees,

(b) compensation of Trustees, and (c) damages in conversion cases. We have no quarrel with them. Defendants discharged every known duty of a Trustee, including a complete accounting. The compensation of the Committee was fairly fixed, and adequately earned. There was no conversion. Even the cases on this subject cited by plaintiffs refer to the conversion of tangible property. We have heretofore referred to cases dealing with securities, but even those are not of interest here, as no conversion is involved.

The above references to Petitioners' brief do not purport to review the same in detail, but are only commentaries upon some of its contents which are characteristic of the whole document.

VIII.

CONCLUSION

In conclusion and by way of summary we submit,

(a) That there are no questions involved in this case that would warrant a review by this court.

(b) That the record contains ample evidence to support the findings of fact and conclusions of law of the Special Master, which were approved and adopted by the District Court, and

(c) That the Circuit Court of Appeals committed no error in affirming the District Court.

Respectfully submitted,

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